# The Solicitors' Journal

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## CURRENT TOPICS

### Conflating Charitable Funds

"INFLATION" and "deflation" are words which we frequently meet, and though the Emperor Diocletian has castigated the former (*The Times*, 20th September) and Mr. BUTLER is no doubt obliged to be careful about the latter, neither causes us much difficulty in the way of "understanding what is said." But we do not remember coming across "conflation" before reading the report of *Re Royal Society's Charitable Trusts* [1955] 3 W.L.R. 342; *ante*, p. 543, and, unlettered as we are, might have had to have recourse to a dictionary were it not that VAISEY, J., has provided a practical synonym in describing one of the objects of the application before him. His lordship was invited, as he says, to authorise the society to "conflate and combine" certain trust funds held by the society as trustees under a variety of charitable trusts into one combined fund or pool in which the several trusts should be deemed to be interested in appropriate aliquot shares. It was also desired to enlarge the scope of permissible investments in regard to the combined fund. The point of this second application was, indeed, to counter some of the ill-effects of currency inflation, but that seems to be a quirk of modern idiomatic language rather than any indication of intrinsic aptness in the choice of the word "conflate." And what was the result of the applications? Had the trusts not been charitable the learned judge would evidently not have felt able to accede to them. In his judgment they were neither within s. 57 of the Trustee Act nor within the court's general jurisdiction as exercised in relation to ordinary trusts. However, the court has, within certain limits, authority to direct a scheme in order to secure the more complete attainment of the objects of a charitable trust, and Vaisey, J., held that, the Attorney-General not objecting, he could by way of a scheme authorise such proposals as those before him. He emphasised that it was an exceptional case.

### Competition and Q.C.'s

A HOUSEWIFE who won her possession case in a London county court without an advocate, and with only the assistance of Every Man's Own Lawyer and other books which she studied in the local library, was the subject of a "news story" in the daily Press on 16th September. "My solicitor," she is reported to have told the Press, "told me that a Q.C. would cost £30. I have that much money, but I would rather spend it on a television set." It is quite a new idea that leading counsel are required to compete with television set manufacturers for the custom of litigants in the county court. If this report as to the cost of briefing silk or the need for briefing him in a possession case in the county court has not been damaged in transit, the outlook for leading counsel appears to be poor indeed, especially with the advent of independent television. Perhaps they ought to take to writing textbooks for the public libraries.

## *CONTENTS*


| | PAGE |
|---|---|
| **CURRENT TOPICS:** | |
| Conflating Charitable Funds | 649 |
| Competition and Q.C.'s | 649 |
| "Business" in Pt. II of the Landlord and Tenant Act, 1954 | 650 |
| House Purchase: Local Authorities' Guarantees | 650 |
| De-control of Dwelling-houses | 650 |
| Short Birth Certificates | 650 |
| The Recoveries from Acquiring Authorities Regulations, 1955 | 650 |
| Actions against Doctors | 651 |
| **THE YEAR'S PROCEDURE CASES—II:** | |
| The Proper Parties | 651 |
| **TAXATION:** | |
| Some Estate Duty Decisions | 653 |
| **A CONVEYANCER'S DIARY:** | |
| "Take the Property as It Is" | 655 |
| **LANDLORD AND TENANT NOTEBOOK:** | |
| Business Premises: Effect of Sale of Reversion | 656 |
| **HERE AND THERE** | 658 |
| **CORRESPONDENCE** | 659 |
| **TALKING SHOP** | 659 |
| **SURVEY OF THE WEEK:** | |
| Statutory Instruments | 661 |
| **POINTS IN PRACTICE** | 662 |
| **NOTES AND NEWS** | 663 |
| **OBITUARY** | 664 |
| **SOCIETIES** | 664 |

### "Business" in Pt. II of the Landlord and Tenant Act, 1954

A READER probing a suggestion (not a conclusion) in a recent "Landlord and Tenant Notebook," *ante*, p. 575, that Pt. II of the Landlord and Tenant Act, 1954, may not afford protection to non-profit-making activities has referred us to the House of Commons Official Report, Standing Committee Debates, 1st April, 1954, containing a statement by the then Home Secretary. He is reported to have said that the Leasehold Committee had recommended that non-profit-making bodies and professional tenants should be covered by any new security-of-tenure legislation for business tenants, and he added that there was a great range of organisations to cover—for example, professional bodies, trade unions and charities; he saw no logical reason for excluding them. But it seems that the Legislature has left the question to the courts, as suggested in our article, and such statements as the above, while they may assist understanding, would be of no use in litigation. It is well established that utterances in Parliament during the passage of a Bill do not influence interpretation of the Act (recent authorities are *R.* v. *Board of Education* [1909] 2 K.B. 1045; *Lumsden* v. *Inland Revenue Commissioners* [1914] A.C. 877, at p. 908; *Hollinshead* v. *Hazleton* [1916] 1 A.C. 428, at p. 438; *Assam Railways, etc., Co.* v. *Inland Revenue Commissioners* [1935] A.C. 445, at p. 458), and the same applies to committee reports, recommendations, etc. (*Martin* v. *Hemming* (1854), 18 Jur. 1002; *Ewart* v. *Williams* (1854), 3 Drew. 21; *Assam Railways, etc., Co.* v. *Inland Revenue Commissioners, supra*). As to logic, invoked by the Home Secretary, an inference that security of tenure was granted when the grantee's livelihood was affected, but not otherwise, would seem to be a logical one; but if not there is again ample authority to show that while logic may govern Home Secretaries, it does not necessarily govern, though it may influence, courts of law (see Maxwell on the Interpretation of Statutes, Ch. XII; Greer, L.J.'s judgment in *Townley Mill Co.* (1919) v. *Oldham Assessment Committee* [1936] 1 K.B. 585 (C.A.), at p. 613). The point is certainly not unarguable, but when arguing it regard must be paid to such principles as underlay Kennedy, L.J.'s pronouncement in *Vacher & Sons, Ltd.* v. *London Society of Compositors* [1912] 3 K.B. 547, at p. 564: "I decline to speculate, in regard to any statutory enactment which it becomes my duty to interpret, as to what is the policy to which the Legislature thought it was giving the force of law."

### House Purchase: Local Authorities' Guarantees

UNDER a new scheme sponsored by the Ministry of Housing and Local Government, of which fuller details are given at p. 663, *post*, a purchaser of a house can now obtain a 95 per cent. advance on a £2,500 house built after 1918. Hitherto a 95 per cent. loan was limited to post-1918 houses valued at £2,000. Advances for pre-1919 houses are limited to 90 per cent. on a £2,500 house. The minimum normal advance by the building society above which the guarantee operates will be governed by a sliding scale and will depend upon the amount of the deposit made by the purchaser. A purchaser wishing to borrow less than the full 95 per cent. or 90 per cent. will now be able to do so. Local authorities are asked to give the same consideration to applications for guarantees from societies registered under the Industrial and Provident Societies Acts as they are prepared to give to applications from building societies. The local authority's guarantee will end when the principal outstanding falls to 50 per cent. of the purchase price or valuation, whichever is the lower. Where the original term of the guarantee is for not more than twenty-five years, the guarantee will remain effective if the repayment period is extended because of the operation of an interest variation clause. A circular to housing authorities and county councils (No. 45/55, price 6d.), sets out the new scheme in detail and contains model forms of guarantee and of application therefor.

### De-control of Dwelling-houses

Mr. E. C. JONES, borough treasurer of Reading, addressing the annual conference of the Institute of Housing at Hastings on 16th September, said that rent control was "an evil which should receive urgent national consideration." He contended that its disappearance would mean better use of existing accommodation, encourage private house building for renting, and prevent houses from falling into decay, although, if control were abolished, assistance would be needed for some old people and large families. He added that the Government's target of 300,000 houses was sufficient only to "keep things going," and therefore the housing position in this country was getting worse. He suggested that rents could be increased by six-monthly or yearly stages. Something in the nature of gradual de-control will certainly have to be started soon. In a sense, a start has already been made in s. 35 of the Housing Repairs and Rents Act, 1954, which exempts dwelling-houses erected and self-contained premises converted after 30th August, 1954, from the operation of the Rent Acts. De-control should be based on a clear principle and an endeavour should be made to apply it consistently. A rateable value test of exemption seems *prima facie* to be capable of producing more equitable results than a test based on existing rentals.

### Short Birth Certificates

THE existence of the short birth certificate, which the General Register Office gives each year in almost as great a number as the long certificate, is not as widely known as it should be. Proof of age is nowadays required for pension schemes, applications for passports, and for proving entitlement to various social benefits. The short birth certificate, giving particulars of name, sex and date and place of birth only, which was introduced in 1947, is accepted by all the authorities. The General Register Office have intimated that they will give any help possible to those who have difficulty in establishing proof of their age for official purposes. Many Government departments and public corporations have recognised where, for one reason or another, a birth certificate cannot be produced, alternative evidence like a certificate of baptism, a statement from school records or from those of the medical officer of health, or a statutory declaration by some responsible person with a knowledge of the facts. The National Council for the Unmarried Mother and her Child have done useful work in bringing these facilities to the attention of elderly people who have suffered hardship owing to their reluctance to disclose their illegitimacy. Solicitors can help in the good work.

### The Recoveries from Acquiring Authorities Regulations, 1955

THE Recoveries from Acquiring Authorities Regulations, 1955 (S.I. 1955 No. 1381), recently made by the Minister of Housing and Local Government under s. 52 of the Town and Country Planning Act, 1954, are of considerable interest to solicitors who have to advise local and other authorities who possess compulsory purchase powers, but other solicitors may regard themselves as fortunate that they are not

concerned with these further complications of the financial structure introduced by the 1954 Act. Where an acquiring authority have resold land to a private person or body before 18th November, 1952, at existing use value, the regulations wholly relieve the authority of any liability under s. 52 to repay to the Central Land Board any payment made by the Board under s. 59 of the Town and Country Planning Act, 1947, or Pt. I of the 1954 Act in respect of that land; where the resale price is above the existing use value, the liability for repayment is limited by the regulations to the amount of development value included in that price. Where the resale was made before 1st January, 1955, to another authority possessing compulsory purchase powers, the selling authority remain liable to the Board under s. 52, but the regulations empower that authority to recover from the second authority the whole of any payment they have to make to the Board if the resale was at existing use value, or, if the resale was at a higher price, the amount of the payment less the element of development value in the price. The regulations also apply the provisions of subs. (6) of s. 52 to acquisitions by agreement by authorities possessing compulsory purchase powers. The subsection empowers the Minister in the case of compulsory acquisitions on or after 1st January, 1955, to recover from the acquiring authority compensation payable by the Minister to a previous owner under Pt. II or Pt. V of the 1954 Act for planning restrictions on the land before the date of the notice to treat, and also empowers the Board in such cases to recover any part of the 1947 Act, Pt. VI, claim relating to the land acquired which has been set off against development charge on other land. The Ministry have issued an explanatory circular, No. 46/55, on the regulations.

### Actions against Doctors

THE Report of the Ministry of Health for 1954 (Cmd. 9566, price 8s. 6d.) contains for the first time a review of the increase in claims and legal proceedings against hospitals and their staffs, principally medical staffs, which has occurred since 1948. No figures are available for the exact number of these cases, but there was some evidence that by 1954 the peak had been reached, or even passed. In the year ended 31st March, 1950, £23,636 was paid out in compensations of all kinds. The figure rose to £106,574 in 1952 and to £152,590 in 1953. In 1954 the figure was similar—£159,047. The number of claims has not increased in the same proportion as the amounts paid out, because the courts have tended to make higher awards. In 1953–54 the highest compensation payment was nearly £12,500, whereas in the first nine months of the National Health Service the highest was £1,000. "There is no evidence whatever" it states, "that there has been any deterioration in the standard of service provided which might account for the increase in the number of claims." If there is no evidence of any deterioration in the standard of service, there is plenty of evidence in the figures that, until legal aid came into operation, many claims must have gone uncompensated. The standard of care required of doctors is the average skill, i.e., neither higher nor lower than that demanded of their fellow practitioners in the same profession. This applies to all professional persons. If it is suggested that different tests should apply to doctors or that different tribunals should try their cases, whether on account of the alleged greater vulnerability of their professional reputations or for any other reason, many members of other professions will emphatically join issue.

# THE YEAR'S PROCEDURE CASES—II: THE PROPER PARTIES

To find one of the Rules of the Supreme Court (or its subject-matter) referred to in no less than five cases reported in one year is surely unusual when it is considered that the rule in question has existed unchanged since 1875. We mean Ord. 16, r. 11, which is headed "Misjoinder and Nonjoinder. Striking out and adding parties. Consent of plaintiff or next friend." The three phrases indicate the layout of the rule very well. In the first place, it is provided, an action is not to be defeated by reason of the misjoinder or nonjoinder of parties; the court is to deal with the issues so far as regards the rights and interests of the parties actually before it. "I think that makes it quite plain," says Devlin, J., in *Baker* v. *Barclays Bank, Ltd.* [1955] 1 W.L.R. 822, at p. 831; *ante*, p. 491, "that, whereas before [the Judicature Acts] by plea in abatement one could require as a matter of procedure that all the relevant parties should be brought before the court, now . . . it is immaterial to the rights of the parties to the cause or action whether all the proper parties are before the court or not." Then the rule gives the court power, at any stage of the proceedings, with or without application by either party, on terms it thinks just, to strike out parties improperly joined, or to add as plaintiffs or defendants any parties who ought to have been joined, "or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." Finally, the written consent of an added plaintiff is stipulated for; and provision made for service on an added defendant.

The three parts of the rule are seen from a consideration of the recent cases to be complementary, and yet to be capable of operating independently of one another. Between the parties actually before the court in the Privy Council case of *Hanoman* v. *Rose* [1955] 2 W.L.R. 53; *ante*, p. 43, there was certainly a matter in controversy concerning their rights and duties. There were claims on each side for an injunction, a declaration and damages, *A* alleging a right to depasture his cattle on land occupied and beneficially owned by *B*, and *B* denying that right. It appears that *B* had impounded some of *A's* cattle. What gave rise to the procedural difficulty was that *B*, though he had paid for and taken possession of the land, had not yet taken a conveyance of the legal title, which remained in his vendors, *C, Ltd.*, and *C, Ltd.* were not before the court. We should mention that the scene of all this is British Guiana, where they call a conveyance by the delightful name "transport," but where they have a rule of court not materially different from R.S.C., Ord. 16, r. 11. Nevertheless, the West Indian Court of Appeal made an order dismissing both the claim and the counter-claim on the short ground that the lawfulness or otherwise of the entry of *A's* cattle on to *B's* land was so inextricably woven with the existence or non-existence of a servitude claimed by *A* over land in the legal ownership of *C, Ltd.* that it could not be determined in the absence of *C, Ltd.*

The Judicial Committee, allowing an appeal from the West Indian court, emphasised that there was a real substantial question to try vitally affecting the two persons

who were parties to the action. Those persons, in view of the injunctions and damages claimed, were necessary parties. The dispute over the servitude may have made it necessary to add another party to the action, but the absence of that other party could not make the action fundamentally bad. The action was remitted for *C, Ltd.*, to be joined and for the matter to be determined on its merits. In other words, the Privy Council treated the relieving provision against mere technicality which forms the first part of the rule as calling into play the discretion to add parties which is contained in the second.

That the power to enlarge the title roll of an action is only a discretionary one is illustrated by two cases from different standpoints. The Crown was not a party to the celebrated action of *Morelle, Ltd.* v. *Wakeling* [1955] 2 W.L.R. 672; *ante*, p. 218. The Attorney-General, however, was given the opportunity to attend before the Court of Appeal as *amicus curiæ*, for the result of the case in the court below had been such as to affect the Crown by deciding that a "fag-end" leasehold was forfeit to it under the Mortmain Acts. Assets of this nature being what they are, it is understandable that those advising the Crown should have applied to bring it in as a party that ought to have been joined. The Attorney-General frankly said that he wished to be in a position to argue before the House of Lords. The court twice listened to this application, before the appeal opened and again after judgment, but twice, in its discretion, refused it. Thus the application for joinder was made by the proposed new party in order the better to challenge a judgment which, though pronounced between others, affected the position of that new party. The Master of the Rolls is reported by *The Times* as saying that the court could not and should not accede to it.

In *Atid Navigation Co., Ltd.* v. *Fairplay Towage and Shipping Co., Ltd.* [1955] 1 W.L.R. 336; *ante*, p. 235, it was an existing defendant, a company, which applied under Ord. 16, r. 11. The court was asked to add two other companies as defendants. Wynn Parry, J., satisfied himself by analysis of the pleadings that the addition sought was not necessary for the determination of the issues raised between the plaintiff and defendant by the statement of claim and defence. In the view he took, the application had to stand or fall on the submission that the defendant company ought to be allowed to have the two further companies joined as defendants in order that they might become co-plaintiffs in a counter-claim which the defendant company had delivered. This had been *one* of the grounds upon which the court in *Norbury Natzis & Co., Ltd.* v. *Griffiths* [1918] 2 K.B. 369 had allowed new defendants to be joined, but in that case the intervening parties would also have been proper defendants to the original claim. Wynn Parry, J., applying a *dictum* from the very earliest days of the modern rules of court, treated the existence of some cause of complaint by the plaintiff against the proposed new defendant as an essential condition of exercise of the jurisdiction to add him as a defendant, at any rate against the will of the plaintiff. The learned judge held that he had no power to add the new parties.

In neither the *Morelle, Ltd.*, nor the *Atid Navigation* case was there any suggestion that the action would languish for want of the parties whom it was sought to add. The court was asked to exercise the powers conferred under the second sentence of r. 11 for reasons unconnected with the first part of the rule. But there are certain causes of action which in law cannot be prosecuted in the absence of some particular person. A plaintiff who has made, for instance, an equitable assignment of part of the debt which he alleges cannot by himself sue for *any* part of the debt without in some way bringing the assignee before the court. So much is reaffirmed in *Walter & Sullivan, Ltd.* v. *J. Murphy & Sons, Ltd.* [1955] 2 W.L.R. 919; *ante*, p. 290. There an official referee before whom the question of the competence of the action was tried as a preliminary point had stayed the action. The Court of Appeal was immediately concerned, not with any application to add parties, but with an appeal from this order for stay.

The court went further than the referee: it held that the defendants were, in the circumstances we have indicated, entitled to an order dismissing the claim unless within a fixed period it were put in proper form. That could be done by joining the assignee as a plaintiff if the assignee consented (see the third head of r. 11), or as a defendant should he not be willing. (It seems that an application would have to be made for this purpose. There is no facility for adding parties, even by third party notice, without the leave of the court.) At first sight, it might appear that the court's readiness to dismiss the claim was in conflict with the first sentence of Ord. 16, r. 11, for did not the judgment cause the action to fail by reason of the nonjoinder of a party? Perhaps what prompted the learned lords justices not to order then and there that the assignee should be joined (as the court undoubtedly can order of its own motion), in order that the plaintiff's right to the unassigned portion of the debt might be tried as against the defendant debtor, was the possibility of an alternative solution which they indicated. The assignee might be prevailed upon to agree to the withdrawal of the notice of assignment upon the substitution of some letter of trust binding the plaintiff to hold for him any sum recovered in the action.

Upon an excellent precedent, we have saved the most interesting case upon the rule until last. *Baker* v. *Barclays Bank, Ltd.*, from which we cited a passage in our first paragraph, concerned the right of one partner to recover from a bank damages for the conversion of cheques belonging to the partnership misappropriated by the other partner. One of the defences set up was that it was necessary that both partners should be joined in the action. Devlin, J., had already held that one co-owner can convert the property of another co-owner; but it was nevertheless said that as a matter of procedure the wronged partner must sue in the firm name, or must join all the partners as plaintiffs. The answering contention accepted by the learned judge was that, conceding that the bank would in any case have a good defence as against the fraudulent partner, there was nothing to prevent the plaintiff recovering from the bank in respect of his own interest in the cheques, which amounted on the facts to half their value.

But for Ord. 16, r. 11, his lordship explained, it would no doubt be necessary that the fraudulent partner should be joined. If he refused to join as plaintiff, then it would have been essential to bring him in as defendant. However, since the rule it was quite plain that "it is only if the court considers that it cannot deal effectually and completely with the question involved in the matter" that it would require the other partner to be joined. *Brewer* v. *Westminster Bank, Ltd.* [1952] 2 T.L.R. 568 was to be distinguished because that dealt with an indivisible joint contractual right, not with a claim based on a right of property. In the present case, there was nothing to be gained by insisting on partnership proceedings being taken first (though his lordship indicated that that might be the proper course if a partner in a flourishing partnership "suddenly took it into his head"

to sue a third party in respect of his share of partnership property) nor by having the defaulting partner brought in as a party to the action.

All these cases round out our conception of an important procedural provision. The courts will not refuse to decide a real issue between the parties who come or are brought before it merely because it may concern other persons (*Hanoman* v. *Rose*; *Baker* v. *Barclays Bank, Ltd.*). But it has a discretion so to constitute the action that persons who ought to be heard are brought before it (*Walter & Sullivan* v. *Murphy & Sons*). It does not necessarily add as a party any person who is affected by the result of its decision (*Morelle* v. *Wakeling*). And for a person to be added as defendant, at all events against the plaintiff's will, he must be someone against whom the plaintiff has some cause of complaint which ought to be decided in the action. The desire to join additional defendants as plaintiffs in a counter-claim is not of itself sufficient to give the court jurisdiction (*Atid Navigation* v. *Fairplay Towage*). J. F. J.

***Taxation***

# SOME ESTATE DUTY DECISIONS

THE legal year which has just ended has been a singularly uneventful one so far as concerns the subject of estate duty. It is thought, however, that it might be convenient at the end of the year to collect together such decisions as there have been and to indicate quite briefly their effect.

*Walker and Others* v. *C.I.R.* [1955] T.R. 137

This was a Scots appeal to the House of Lords, and was concerned with the Married Women's Policies of Assurance (Scotland) Act, 1880, s. 2, which corresponds to the Married Women's Property Act, 1882, s. 11. It provides that a policy of assurance effected by any married man upon his own life, and expressed upon the face of it to be for the benefit of his wife or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed to be a trust for the benefit of his wife, etc., with the result that the assured will never have had any interest in the policy or policy moneys. Thus they will, by the Finance Act, 1894, s. 4, be exempt from aggregation. In this case, the policies were for the benefit of a nominated child if he should survive his father, and, if he did not do so, for the benefit of the other two children equally, and if one survived then wholly for that child, and if all three children predeceased their father for the benefit of the estate of the child who died last. Before the Court of Session the case had been tried together with another, *Haldane's Trustees* v. *C.I.R.*, where the provisions were the same except that, in the event of all the children predeceasing the assured, the policies in that case were to vest absolutely in the last child to die rather than, as in the *Walker* case, to be held for the benefit of the estate of the child who died last. It was argued on behalf of the Commissioners of Inland Revenue and accepted by the Court of Session that this was a valid distinction, because should that last child die without having made a will the heirs *ab intestato* of that child would take under the terms of the policy, so that those terms were not exclusively for the benefit of the assured's children and so that the policies were not within s. 2 of the 1880 Act. It suffices to say that the House of Lords were unanimous in reversing this decision and holding that in fact in those circumstances the heirs *ab intestato* did not take under the terms of the policies because, in the words of Lord Morton :—

> " The destinations in the policy were spent and finished when the policy was carried to the estate of the last surviving child."

Legal personal representatives of the last surviving child would receive the policy moneys and would deal with them as part of the child's estate. Accordingly, it was held that the policies were within s. 2 of the 1880 Act and accordingly were exempted from aggregation.

*Perpetual Executors and Trustees Association of Australia, Ltd.* v. *Commissioners of Taxes for the Commonwealth of Australia* [1954] A.C. 114

This was the case under the Commonwealth Estate Duty Assessment Acts, 1914–42, and so is not of direct importance to those concerned with the Finance Act, 1894. Nevertheless, it does decide an interesting point on the passing of goodwill in the case of a partnership. The importance of the well-known case of *A.-G.* v. *Boden* [1912] 1 K.B. 539 is concerned with the application or non-application of the Finance Act, 1894, s. 3. It will be recalled that in substance the facts of that case were that the deceased and his two sons were in partnership and that the two sons undertook various obligations in consideration of which the deceased's share in the goodwill of the partnership passed to them on his death without further payment: it was decided that in those circumstances the transaction amounted to a sale so that when the goodwill passed it passed in consequence of a sale within the Finance Act, 1894, s. 3, and so escaped liability for estate duty. This aspect of this decision remains untouched by the decision of the Privy Council with which we are now concerned, but in *A.-G.* v. *Boden*, *supra* (at p. 556), Hamilton, J., as he then was, whilst emphasising that it was not necessary for him to decide the point, expressed the view that where a partnership deed provided that no allowance for goodwill should be made to a partner or his estate on his death his interest in the goodwill did not pass under the Finance Act, 1894, s. 1, but was an interest ceasing upon his death and so deemed to pass under the Finance Act, 1894, s. 2 (1) (*b*). The Judicial Committee of the Privy Council have now dissented from that view and expressed the opinion that the deceased partner's interest passes with his interest in the other assets of the partnership to his legal personal representative, and the fact that its value is to be ignored in computing what the personal representative will receive from the surviving partners is irrelevant. Accordingly, it may now be taken that the goodwill, where it is not exempted from duty by the Finance Act, 1894, s. 3, will be chargeable to tax under s. 1, *ibid.*, and not under s. 2 (1) (*b*).

*Re Hall's Settlement* [1955] 1 Ch. 128

The case last mentioned will, of course, have recalled to readers' minds, if such reminder were necessary, that property can either pass under the Finance Act, 1894, s. 1, or if it does not so pass it may be deemed to pass under s. 2, *ibid.*; it has long been settled by *Earl Cowley* v. *C.I.R.* [1899] A.C. 198 that those two provisions are mutually exclusive and, further, that s. 2 is not a definition section but a provision enlarging the ambit of the charge imposed by s. 1. In the present case, certain shares in a company controlled by the deceased had been settled within five years of his death, with

the result that whilst those shares could not pass under s. 1 of the 1894 Act they were deemed to pass as a gift *inter vivos* by s. 2 (1) (*c*) of that Act. Now, the well-known Finance Act, 1940, s. 55, concerned with the valuation of such shares, provides—

> " where for the purposes of estate duty there pass on the death of a person, etc."

In this case, it was argued that that provision applied only where the property did in truth pass under s. 1 and not where it was merely deemed to pass under s. 2 of the 1894 Act. The argument was an interesting one involving, as counsel for the Crown submitted, fundamental questions as to the nature of estate duty. The taxpayer's case was largely founded upon *A.-G.* v. *Milne* [1914] A.C. 765, which was concerned with the Finance Act, 1894, s. 5, imposing settlement estate duty: it was there held that that duty, being a new and separate tax imposed when property passed on the death of a deceased, did not apply where property was deemed to pass on the death of a deceased. In the instant case it was made clear by the judgment of Jenkins, L.J., that the view of the court was that the Finance Act, 1940, s. 55, did not impose any new and separate duty, but only provided a new and novel method of valuing property in order that the old and familiar estate duty could be charged upon it. The taxpayer's appeal was dismissed, and it was held that the Finance Act, 1940, s. 55, applied to shares passing under a gift *inter vivos*. Leave to appeal was given, so that it may be that more may be heard of the matter.

*Re Leven and Melville (Earl), deceased* [1954] 1 W.L.R. 1228

As is so often the case where the deceased's interest in the estate is derived under a strict settlement, the facts of this case appear somewhat involved. The essential matters, however, can be summarised quite shortly. The deceased was tenant for life of certain funds with remainder to successive *stirpes* in tail male with remainder, should those interests fail, upon alternative limitations to persons who, depending upon the events which might happen in the future, might or might not be relatives of the deceased within the meaning of the Finance Act, 1940, s. 44 (2). One of the terms of the settlement was that the deceased should keep his life assured in the sum of £150,000, the policy money to be available for the estate duty payable on the deceased's death. Clearly, the ultimate benefit from those policies was to be enjoyed by one or more of the persons who might take in remainder after the death of the life-tenant. Such policies were effected at an annual cost of £3,050, and they were kept up until 1942, when an order was made under the Trustee Act, 1925, s. 57, authorising the sale of the estate and the conversion of the policies into fully paid-up whole life policies, and by that order it was further provided that the life-tenant should enter into a covenant that at his death his free estate should bear any duty payable on his death in respect of the proceeds of sale of the estate. In pursuance of that order the life-tenant did enter into a covenant with the trustees that his estate would be liable for such estate duty. Subsequently the life-tenant and his eldest son, who had then attained his majority, executed a disentailing assurance and the life-tenant released his life estate to his son. Since the life-tenant died within five years of that later transaction estate duty of some £68,000 became payable in respect of the dropping of the life interest in the settled property, and no question arose upon that. Pursuant to the covenant which had been entered into by the life-tenant, this £68,000 was payable out of his free estate, and the point at issue was whether this £68,000 was properly deductible for estate duty purposes in computing the net value of that free estate.

The Crown's argument was in substance as follows:—

(i) The Finance Act, 1894, s. 7 (1) (*a*), provides that no allowance shall be made for debts incurred by the deceased unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's use and benefit.

(ii) It was admitted by all parties that the covenant entered into by the deceased life-tenant whereby he undertook to make his free estate responsible for the estate duty on the settled estate was a disposition of property within the meaning of the Finance Act, 1940, s. 44 (1). That section provides that—

> " where a person dying after the commencement of this Act has made a disposition of property in favour of a relative of his the creation or disposition in favour of the deceased of an annuity or other interest limited to cease on the death of the deceased or of any other person shall not be treated . . . for the purposes of s. 3 or of subsection (1) of s. 7 of the Finance Act, 1894, as consideration for the disposition made by the deceased."

(iii) The covenant was for the benefit of a class of persons including relatives of the deceased, and the freeing of the life-tenant from the obligation to pay the annual premiums of £3,050 was equivalent to the creation of an annuity in his favour having regard to the wide definition of that word contained in the Finance Act, 1940, s. 44 (3).

(iv) Therefore the Finance Act, 1940, s. 44 (1), applied, and by statute there was no available consideration for the obligation to pay the £68,000 so that its deduction was precluded by the Finance Act, 1894, s. 7 (1).

Wynn Parry, J., held that, it being admitted that the covenant to pay the duty amounted to a disposition, the first question before him was whether that was a disposition in favour of a relative. As has been pointed out above, it was in fact a disposition in favour of a class of persons some of whom were and some of whom were not relatives of the life-tenant and all of whose interests were contingent. The learned judge decided that the question whether a disposition was in favour of a relative or was not was to be determined by looking at the situation at the date of the disposition and not at the date of the death, and further decided that if, looking at a disposition at the date of that disposition, it cannot be predicated whether the person or persons who will benefit will or will not be relatives, then it cannot be said that it was a disposition in favour of a relative and so the section did not apply.

That was sufficient to dispose of the matter, but the learned judge expressed the view, in case the matter should go to a higher court, that upon the true construction of the provision the extinguishment of the life-tenant's obligation to make a series of annual payments (the premiums on the insurance policies) did not amount to a disposition of an annuity in his favour.

*Re Barbour's Policies of Assurance* [1955] 3 W.L.R. 457

This is the latest decision upon the perennially difficult topic of the liability of policies and the policy moneys arising thereunder, and it is the first reported decision since *Re D'Avigdor-Goldsmid* v. *C.I.R.* [1953] A.C. 347 went far to revolutionise the law of this matter. It will be recalled that in substance the effect of the *Re D'Avigdor-Goldsmid* decision was that, where the beneficial interest in a policy was absolutely vested in a beneficiary both before and after

the death, then there could be no charge under the Finance Act, 1894, s. 2 (1) (*d*). Of course, if he had enjoyed that beneficial interest for less than five years and if he had obtained it by way of gift from the deceased within that time there would be a charge under the Finance Act, 1894, s. 2 (1) (*c*), as a gift *inter vivos*, but that is a different matter. It is always to be remembered in applying the *D'Avigdor-Goldsmid* decision that it will not apply if there is a change or modification of the beneficial interests on the death of the life assured or at a time ascertainable only by reference to the death. This was made clear by Lord Morton of Henryton at [1953] A.C., p. 369, and one should recall *Adamson* v. *A.-G.* [1933] A.C. 257 as authority for the proposition that it may be a sufficient change if interests which previously were defeasible become indefeasible, so that a policy in the beneficial ownership of, say, such of *A* and *B* as shall survive the life assured may not be within the principle of *D'Avigdor-Goldsmid*.

In the latest case there was a settlement made in 1929, the original corpus thereof being £12,000 in cash and two fully paid policies of insurance. Clause 2 of the settlement defined "the trust fund" as being the residue of the policy moneys after payment of certain death duties plus the £12,000 in cash. By cl. 4 it was provided that the trust fund in the events which happened should be settled upon one *J.B.* during his life. At the time of the death of the settlor, *J.B.* had been in receipt of the income of the trust fund for some nine years and continued to receive it after the death of the settlor, although, of course, the amount of income available for him was increased after the death of the settlor by reason of the fact that the policies which were up to then non-income-bearing assets fell in and provided money for investment. It was not argued by counsel on behalf of the Crown that the mere fact that in this case the beneficiary's interest was a life interest rather than an absolute interest was sufficient to distinguish the case from *D'Avigdor-Goldsmid* v. *C.I.R.*, *supra*. It was argued on behalf of the Crown, however, that upon the true construction of this particular settlement the beneficiary had not been in possession of the policies as life-tenant before the death of the settlor. This was based largely upon the definition in cl. 2 of the settlement whereby the trust fund was expressed to connote not the policies themselves but only the moneys arising thereunder, and it was suggested, it seems, that upon the true construction of the settlement had there been a power to surrender the policies and had they been surrendered, or, alternatively, had the insurance society been put into liquidation, it would have been necessary during the life of the settlor to accumulate the income from any moneys thus forthcoming on the ground that *J.B.'s* interest in that part of the corpus did not fall into possession until the death of the settlor. Harman, J., rejected these contentions and found that upon the true construction of the settlement *J.B.* would have been entitled to any income or profits from the policies had there been any during the life of the settlor, and that a life interest is no less in possession because the corpus over which it extends is not of a nature to produce any income for the life-tenant.

G. B. G.

***A Conveyancer's Diary***

# "TAKE THE PROPERTY AS IT IS"

ONE of the questions which arose in the recent case of *Jennings* v. *Tavener* [1955] 1 W.L.R. 932, and p. 543, *ante*, was the effect of the general condition which appears in the National Conditions of Sale, 15th ed., in the following form: "12 (3). The purchaser shall be deemed to buy with full notice in all respects of the actual state and condition of the property sold and shall take the property as it is." The sale in this case was a sale by the builder of a half-finished house, and this is, I believe, the first instance of this condition, or any condition of a similar kind, being relied upon otherwise than in connection with the state of repair of leasehold properties subject to a covenant to repair and the rights and liabilities of the parties in regard thereto.

If the subject-matter of a sale is leasehold property held for a term which is determinable by re-entry for breach of any covenant and there is a covenant to keep the property in repair (which is, of course, almost invariably the case nowadays if the lease has been properly prepared), a good title is not shown unless the vendor can satisfy the purchaser that no occasion for forfeiture has occurred by reason of non-repair of the property. But if a man buys land with notice that a good title cannot be made, the vendor is exonerated from showing title to the extent indicated by the notice, unless (and this is unusual) he should have expressly agreed by the contract to show a good title. It follows, therefore, that if a purchaser buys leasehold property with notice that there has been a breach of covenant which cannot or will not be remedied by the vendor, he is precluded, in the absence of an express stipulation in the contract that the vendor shall show a good title, from requiring evidence that the covenant in question has been performed. An example of the case where this rule is particularly applicable is that of property comprised in a repairing lease which is obviously in a dilapidated condition and the purchaser agrees to take the property as it is. See Williams' Vendor and Purchaser, 4th ed., vol. 1, pp. 409 *et seq.*

The purchaser's agreement to take the property as it is, it is suggested in Williams in the passage referred to above, need not appear in the contract, and may be inferred from the conduct of the parties. There appears to be no direct authority for this proposition and, indeed, the only reported decision on these facts is the other way: *Re Highett and Bird's Contract* [1902] 2 Ch. 214; [1903] 1 Ch. 287 (C.A.). In that case a purchaser entered into an open contract to buy a leasehold house which was obviously out of repair, and a reduced price was accepted by the vendor as a consequence. Before the title was accepted a dangerous structure notice was served on the vendor requiring him to make the premises secure or pull them down, and, the notice not having been complied with, an order was made in the police court requiring the vendor to comply with the notice within a given time. This order was made before, but not served until after, the purchaser accepted the title. This case is often referred to in connection with the question when the expense of complying with a statutory notice served by a local or other authority becomes an outgoing, to be discharged by one or other of the parties in accordance with their respective obligations in that respect, but in fact the Court of Appeal left that particular point open, and decided the case on other grounds. They held that the purchaser had proved a breach of the repairing covenant in the lease, and (relying on *Barnett* v. *Wheeler* (1841), 7 M. & W. 364), that the vendor's obligation to make

a good title had not been removed by the knowledge of the purchaser at the date of the contract that the title was bad by reason of the breach of the repairing covenant; it followed that the expense of complying with the police court order had to be borne by the vendor.

This decision was criticised by the learned author of Williams on Vendor and Purchaser in the passage I have referred to, on two grounds: first, that *Barnett* v. *Wheeler* did not justify or support the decision; and, secondly, that for some unexplained reason the well-established rule, that notice on the part of the purchaser of a particular defect in the title in the absence of an express obligation on the vendor's part to make a good title exonerates the vendor from showing title as regards the defect in question, was never brought to the notice either of the judge who tried the case or of the Court of Appeal. And in a subsequent case one of the members of that court treated the entire decision as somewhat special (see *Re Allen and Driscoll's Contract* [1904] 2 Ch. 226, *per* Sir Robert Romer, L.J.).

It is then suggested, however, in Williams that to avoid all question of the application of the decision there criticised a vendor selling houses held under a repairing lease should be careful to stipulate expressly in the contract for sale that the purchaser shall be deemed to have notice of the actual state and condition of the property and shall take the houses as they are; and *Lockharts* v. *Bernard Rosen & Co.* [1922] 1 Ch. 433 is cited as an example of the efficacy of such a condition. In that case the defendants agreed to buy certain leasehold premises from the plaintiffs for £150, and to take an assignment of the lease subject to the consent of the superior landlord being obtained and to the premises being taken in their then present condition. Two days after the purchasers had accepted the title, subject to consent to the assignment being obtained, the superior landlord served a schedule of dilapidations on the vendors and informed them that her licence to assign would not be given until the schedule was complied with. The vendors forwarded the schedule to the purchasers, and when the purchasers refused to carry out the repairs mentioned therein, themselves carried them out at a cost of £225, and obtained a licence to assign from the landlord. The vendors then claimed specific performance of the contract on the footing that the £225 ought to be borne by the purchasers as an outgoing. The vendors were held to be entitled to this relief on the following grounds: (1) By contracting to take the premises in their then present condition, the purchasers had assumed liability to pay the cost of any subsequent repairs and to indemnify the vendors against such cost. (2) Although the cost of the repairs was in a sense part of the costs of making title, it was an expense for which the purchasers had expressly assumed liability. (3) From the date of the contract the vendors in the circumstances held the premises in their dilapidated condition as trustees for the purchasers, with a corresponding right of indemnity against the costs of any subsequent repairs or outgoings. This decision has recently been referred to with approval by Danckwerts, J., in *Butler* v. *Mountview Estates, Ltd.* [1951] 2 K.B. 563, another case of a sale of leasehold property subject to repairing covenants which had not been complied with at the date of the contract.

That is undoubtedly the normal case in which a condition to take the property as it is will operate. In *Jennings* v. *Tavener*, however, the facts were quite different. The purchaser's complaint was that the house, the subject-matter of the sale, was unfit for habitation (a fact which was found in his favour at the trial), in breach of an implied obligation to build the house with reasonable care and skill and with good materials, etc. Jones, J., held that there is a warranty implied in a contract for the sale of a house in the course of construction that it should be fit for habitation and completed in a workmanlike manner, and that this warranty extended to the provision of proper foundations (the lack of which caused the trouble which led to the action in the case). This part of the judgment, in which several authorities are reviewed and analysed, will be very useful to the dissatisfied purchaser in similar circumstances in the future. But the defendant at the trial relied on condition 12 (3) of the National Conditions, and the learned judge had to consider the argument based thereon. It was clear from a special condition which fixed the time for completion of the contract by reference to the date of the completion of the building of the house, that the contract as a whole was a contract for a house in course of erection, and on this basis the learned judge held that condition 12 (3) of the National Conditions (which were incorporated in the contract only in so far as they were not inconsistent with any special conditions) did not apply.

The implication is, or may be, that but for the existence of the special conditions in question cl. 12 (3) of the National Conditions would have applied, with the result that the plaintiff would have been deprived of what would appear to have been well-deserved redress. Doubtless, most contracts for the sale of buildings in course of erection at the date of the contract contain pretty clear indications somewhere, in the particulars of the property or in a special condition, that the property is in course of erection, and such an indication would be sufficient to displace the application of a condition in the terms of cl. 12 (3). But this is a point which should be looked to in settling such a contract on the purchaser's behalf.

"A B C"

***Landlord and Tenant Notebook***

# BUSINESS PREMISES: EFFECT OF SALE OF REVERSION

THERE are various ways of dealing with a client who suggests that a written agreement is unnecessary because the intending landlord is such a nice man. One is to point out that, even if he is so nice that he would never dream of selling the property over his tenant's head (the popular metaphor was adopted by Scott, L.J., in *Epps* v. *Rothnie* [1945] K.B. 562 (C.A.)), he may die, be adjudicated bankrupt, or be certified insane; in each of which cases he would be succeeded by a landlord who, however nice, would have to act on evidence available. But if one went on to say that a lease or written agreement would ensure that the tenant would have the same rights against any successor in title as he or she had against the grantor, one would, in the case of business premises to which Pt. II of the Landlord and Tenant Act, 1954, applies, now have to qualify such advice, emphasising that it might not apply to statutory rights of security of tenure.

*X.L. Fisheries, Ltd.* v. *Leeds Corporation* [1955] 3 W.L.R. 393 (C.A.); *ante*, p. 560, concerned the effect of what Evershed, M.R., called a change in the personality of the landlord on the statutory right to a new tenancy. The

applicant company held, in 1954, a seven years' lease of a fried-fish shop, due to expire 1st March, 1955. The Landlord and Tenant Act, 1954, having been passed, they served their then landlord with a formal request for a new tenancy, under s. 26, on 22nd November, 1954. The first subsection of s. 26 enables a tenant thus to take the initiative if his tenancy is for a term of years certain exceeding one year; the second provides that he shall name a date for commencement not more than twelve nor less than six months from the date of the request, and the applicants did specify 1st June, 1955, as commencement date. By the sixth and last subsection the landlord is entitled to give notice of intended opposition to the application, and the notice must state on which of the grounds mentioned in s. 30 he will so oppose it. These grounds, as Evershed, L.J., observed in his judgment, are of very different kinds. Some relate to the conduct of the tenant during the expiring tenancy—disrepair, unpunctual payment of rent, etc.; then there is an "alternative accommodation" ground; others enable a landlord to oppose because of his intended user of the property or the site.

But the then landlord of the applicants in *X.L. Fisheries, Ltd.* v. *Leeds Corporation* served no notice of opposition. What she did was to sell, on 19th January, 1955, the reversion to the defendants, who wanted the premises for police purposes; and who on the same day notified the applicants of their purchase and informed them (i) that they would not agree to a new tenancy, and (ii) that they had asked the Home Secretary for a certificate under the Landlord and Tenant Act, 1954, s. 57.

The effect of these communications may well have been startling. Even if the applicants had made themselves familiar with the provisions of Pt. II of the Act—"Security of Tenure for Business, Professional and Other Tenants"—which might be expected to contain all they needed to know, they would hardly have expected such a notification. For s. 57 is to be found in Pt. IV—"Miscellaneous and Supplementary." The marginal heading of the section is, however, "Modification on grounds of public interest of rights under Pt. II." Its first subsection provides that where the interest of a landlord belongs to or is held for the purposes of a Government department or is held by a local authority, statutory undertakers or a development corporation, the Minister or Board in charge of any Government department may certify that it is requisite for the purposes of the department, authority, etc., that the use or occupation of the property shall be changed by a specified date. Subsection (2) obliges the owner of the interest to notify the tenant that the question is before the Minister and that he (the tenant) may make representations. The third subsection deals with the position that may arise if a landlord's notice to terminate has been given under s. 25 when the certificate is issued. Subsection (4) is the one that governed the situation in *X.L. Fisheries, Ltd.* v. *Leeds Corporation*. It runs: "Where a tenant makes a request for a new tenancy under s. 26 of this Act, and the interest of the landlord . . . belongs to or is held as mentioned in subs. (1) of this section, the following provisions shall have effect: (*a*) if a certificate has been given under the said subs. (1) in relation to the current tenancy, and within two months after the making of the request the landlord gives notice to the tenant that the certificate has been given . . . then (i) if the date specified in the certificate is not later than that specified in the tenant's request for a new tenancy, the tenant shall not make an application under s. 24 . . . for the grant of a new tenancy . . ."

The Home Secretary granted the certificate and its validity was not disputed: s. 57 (1) says, "the Minister or Board in charge of *any* Government department," the Home Office has some functions to discharge in relation to police forces other than the Metropolitan Police, and at any rate, as the subsection reads, the corporation might have adequately armed itself with a certificate issued by the Foreign Office. The applicants nevertheless proceeded to make their claim in the local county court, where the judge held that the modification provisions did not affect them as the respondents had not been their landlords at the date of the request.

The Court of Appeal allowed the corporation's appeal with, I think it is right to say, some hesitation as well as some reluctance. There is no definition of "landlord" in either Pt. II or Pt. IV of the Act which would help either party; one might compare or contrast the position which obtains in the case of agricultural property, the Agricultural Holdings Act, 1948, s. 94 (1), defining "landlord" as "any person for the time being entitled to receive the rents and profits of any land," which definition may affect the tenant's prospects of recovering compensation if not his security of tenure. The "landlord who has become landlord by purchasing the dwelling-house"—Rent, etc., Restrictions (Amendment) Act, 1933, Sched. I (*h*)—who is disqualified for seeking possession on the ground that he wants it as a residence, etc., has been held to include one who has contracted to purchase: *Emberson* v. *Robinson* [1953] 1 W.L.R. 1129 (C.A.); 97 SOL. J. 571. But in *X.L. Fisheries, Ltd.* v. *Leeds Corporation* the strongest argument which the tenants could advance in support of their contentions was that based on the use of the present tense by s. 57 (4): Where the tenant *makes* a request for a new tenancy . . . and the interest of the landlord . . . in the property comprised in the current tenancy *belongs* to or *is* held as mentioned . . ." The Court of Appeal was obviously impressed by the argument that this means that the period of ownership must cover the period of the request (and declined to commit itself to any views on what would happen if a reversion were sold after the vendor had given notice of opposition). But the conclusion reached was that s. 57 conferred additional privileges, and that there was nothing to require continuity. Evershed, M.R., did express the opinion that the draftsmen had overlooked the contingencies.

Section 59 entitles tenants thus frustrated to some monetary compensation—twice the rateable value of the holding if there has been fourteen years' business occupation, the rateable value if less—but, reverting to my opening paragraph, it would seem advisable to consider, when advising intending tenants of business premises, the possibility of some provision giving them additional compensation in the event of the issue of a certificate under s. 57 (1).

R. B.

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BRITISH YEAR BOOK OF INTERNATIONAL LAW

It has been announced that Professor C. H. M. Waldock, C.M.G., O.B.E., Q.C., Chichele Professor of Public International Law in the University of Oxford since 1947, has been appointed editor of the *British Year Book of International Law*, issued under the auspices of the Royal Institute of International Affairs. He succeeds Professor H. Lauterpacht, Q.C., F.B.A., who retired on his election to the International Court of Justice at The Hague.

A Votive Mass of the Holy Ghost (The Red Mass) will be celebrated at Westminster Cathedral on Monday, 3rd October (opening of the Michaelmas Law Term), at 11.30 a.m. The celebrant will be the Rt. Reverend Monsignor Charles L. H. Duchemin. Counsel will robe in the chapter room at the Cathedral. The seats behind counsel will be reserved for solicitors. Will those desirous of attending please inform the Hon. Secretary, Society of Our Lady of Good Counsel, 6 Maiden Lane, W.C.2, so that an adequate number of seats may be reserved.

# HERE AND THERE

## LEISURE MOMENTS

Now, when the vacation is so nearly over, is the time to pick up a few stray threads and recall what a representative cross-section of the legal community, to use the current jargon, has been doing with itself. First, the Lord Chancellor, its apex, himself in his office a species apart. His vacation has included an unusually varied set of activities. He and Lady Kilmuir took a first instalment of holiday at Portofino on the Italian Riviera where her brother, Rex Harrison, has a villa overlooking the harbour. By way of contrast, steeping himself in an old English atmosphere (not to say " ye olde Englyshe spirit "), he attended a luncheon given by Lord Sempill in honour of the Siamese mission, based on the principle that our diplomatic guests while in London should do as London used to do. The South Kensington hotel where they were entertained specialises in that sort of thing, and Elizabethan wenches distributed peacock, boar's head, ham " in caffyn " and syllabub and poured out sack and mead, while a boy sang grave Elizabethan melodies. Surely, the thing should not have stopped there, and Lord Kilmuir should have been required to attend disguised as Sir Nicholas Bacon, the first Elizabeth's Lord Keeper. Finally, emerging from the past he played a creditable part for the Politicians in the cricket match at East Grinstead in Sussex when they drew with the Stage. Lord Kilmuir scored 15 runs before he was bowled, though it was observed that, no doubt because the anxieties of his office had caused him to lose weight, he was hampered in his actual running by trousers that had to be held up as he moved. This check on his speed he partly made up for by wearing tennis shoes. In a crew-necked white sweater he was a striking figure on whom the Press photographers concentrated. They recorded the Lord Chancellor driving, the Lord Chancellor gravely being assisted in an adjustment of his trousers, the Lord Chancellor giving an autograph to a beautiful young lady. Sir Walter Monckton, who scored six before being bowled a googly from Rex Harrison, was described by the sartorial critics as most elegant and correct, even to the studs on his boots, which did not, however, prevent him from slipping flat on his face as he scrambled home after a chancy run. Otherwise he was a model of agility. Said one critic, his cricket " was like his speeches, not spectacular but well-reasoned, incisive." His performance marked his recovery from the indisposition he suffered while on holiday in Italy by Lake Garda. Lord Cohen has also been laid up. Owing to fibrositis he had to spend part of his holiday in St. Mary's Hospital, Paddington. By contrast, Mr. Justice Karminski and Lady Karminski went to Kuala Lumpur to visit their daughter who is married out there to Lord Cohen's son, Hugh.

## VACATION ACTIVITIES

As usual, rumours of retirement have been busy with the names of Lord Goddard, aged seventy-eight, and Lord Merriman, aged seventy-five, with twenty-three years' judicial service behind him. But in the case of such vigorous veterans one has got accustomed to treating such rumours with incredulous reserve. To Lord Goddard one might recommend the riposte indulged in by Lord Esher when people began to hint that he could not go on much longer as Master of the Rolls; he would get a new wig. There has also been some speculation as to Lord Radcliffe's future, ever since he was nominated as one of the three trustees to run the charitable, artistic, educational and scientific foundation to which is to be donated the greater part of the £300 million fortune of the late Mr. Calouste Gulbenkian. Such an exacting task would hardly be compatible with the work of a Lord of Appeal. For him there must be a very strong pull both ways, both at the level of inclination and at that of public duty. Chance scraps of information about the vacation activities of three of the Lords Justices of the Court of Appeal: Utterly faithful to his professional interests (as one would expect), Lord Justice Denning has been carrying the true doctrine of the development of the law to distant places. In August he addressed the American Bar Association's annual convention at Philadelphia on the basic freedoms of modern man. Some of these, he said, had been abused. Freedom of the Press had been abused by certain newspapers " pandering to sensationalism in order to increase their circulation " both by invading the proper privacy of individuals and making prejudical comments on cases which were *sub judice*. Some trade unions, he said, had also been guilty of an abuse of freedom in the matter of strikes, official and unofficial, and he suggested the establishment of impartial tribunals to determine labour disputes. Lord Justice Birkett, too, is an accomplished and ready lecturer and addresser of intelligent assemblies, but the most striking holiday task reported of him this summer is the winning of a prize of £1 13s. 4d. in a *Spectator* literary competition for a description of the fight between David and Goliath in the manner of John Arlott. One would like to suggest that John Arlott should return the compliment with an impression of Birkett, L.J., delivering judgment, say, in an action for damages by Goliath's personal representatives against David. A more unexpected variant of time off comes from Lord Justice Singleton, who extended his experience of life (always rather a good thing to do) by an excursion into shopkeeping. Having heard that the proprietors of the tobacco, newspaper and sweet shop where he deals, when living with his sisters at Lytham St. Anne's, thought they would not be able to leave it to see their charming daughter Jean crowned queen of the local fête, he volunteered to look after the business for them. Much to their surprise, for they thought he was joking, he duly turned up and took over. Contrary to expectations, for it was thought that everyone would be at the celebrations, his presence created something of a trade boom and the morning's takings were £10. Other vacation activities reported have been Judge Gordon Clark (in his capacity as Cyril Hare) attending the first night of his play " The House of Warbeck " at the Theatre Royal, Margate, and a yachting Q.C. saving life at sea when, sailing his Bermuda-rigged sloop off Whitstable, he saw a little dinghy capsize.

RICHARD ROE.

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The SOLICITORS' ARTICLED CLERKS' SOCIETY have the following activities scheduled for the remainder of this month: Tuesday 27th—Debate; the motion is " That capital punishment should be abolished ", 6 p.m. for 6.30 p.m., The Law Society's Hall. Wednesday 28th—Rugby, S.A.C.S. *v.* The Tortfeasors (a Law School team), at the Old Alleynians' ground, Dulwich Common; train from Victoria to West Dulwich station, turn right at the station and walk along the side of the common for a quarter of a mile; the ground is on the right; those wishing to play contact Irving Benjamin, c/o The Society, or at TUL 4937 (evenings). Saturday, 1st October—An Autumn Dance at the Royal Empire Society, Northumberland Avenue, 7.30 p.m. to midnight; dress optional; tickets 6s., which includes buffet; these may be obtained from the Dance Secretary (S.A.C.S.), c/o The Law Society.

# CORRESPONDENCE

*[The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL*]*

## Rewards of Private Practice

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A tenant of business premises dies, having duly observed all terms of his tenancy agreement, and his personal representatives succeed to the benefit of his contractual tenancy.

As happens in the case of many small businesses, it is difficult for the landlord to discover who are the personal representatives of the deceased tenant; but let us suppose that the landlord is fortunate enough to do so, he will still have to discover whether as trustees they are taking advantage of the provisions of s. 41. There appears to be no obligation imposed upon the trustees by the Act to disclose whether or not the business is being carried on by any one or more of the beneficiaries—a matter which would be difficult, if not impossible, to ascertain by the landlord.

Our landlord cannot invoke the provisions of sub-paras. (*d*), (*e*), (*f*) or (*g*) of s. 30; in other words, he finds himself in the normal position of a landlord of business premises.

How is the landlord to determine the tenancy?

He can, of course, chance his arm by serving a notice to quit in accordance with the terms of the tenancy agreement; this may well be a three months' notice, which is the customary period frequently found in tenancy agreements of small business premises. If the recipient(s) of the notice to quit decide to act warily (as may often happen), the landlord has no other option but to commence proceedings for possession after the expiration of such notice. In practice, it is by no means certain that even at this stage will the personal representatives of the deceased tenant show their hand. They are protected by statute, if they can show the court at the hearing that this is so, and so have no reason for lightly abandoning the protection which has been afforded.

If at the hearing of the action before the court, as may well have been the position throughout unbeknown to the ignorant landlord, the personal representatives are able to avail themselves of the provisions of s. 41, they become the successful litigants and are awarded costs.

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There is, however, provision for excluding premises from Pt. II if business is, even temporarily, not carried on upon them; and if there were a period during which they were not occupied by the tenant or not so occupied for the purposes of a business carried on by him, etc. (s. 23 (1)), or by the beneficiaries covered by s. 41, a common-law notice before they became so occupied would, by virtue of s. 24 (3) (*b*), be effective even if personal representatives subsequently sold the tenancy and business. ED].

# TALKING "SHOP"

*September*, 1955.

TUESDAY, 6TH

I have heard it said that, what with income tax and sur-tax and profits tax and stamp duty and estate duty, we live nowadays in the Wonderland of "Alice in Wonderland," but "Through the Looking Glass" is surely more appropriate to the topsy-turvydom of contemporary taxation. When the child's tax allowance was raised to £100 by the last Finance Act, no change was made in the condition of entitlement, so that if the child has more than £85 income of its own, the parent cannot obtain the usual relief for parenthood. A small thing, perhaps, but tiresome. Several firms of accountants have been busy with the problem, and here I have Messrs. *X* & Co. complaining for and on behalf of Mrs. *L* that her children's trustees are paying her *too much*. And so, indeed, they are, for Mrs. *L* is receiving for each of her two children an annuity of £93 15s. gross, by virtue of which she loses tax relief on £200. We are now busy examining the trust to see whether—and if so, with what effect—the trustees may withhold the offending surplus of £8 15s. for each child. Understandably, perhaps, the draftsman does not seem to have foreseen this reluctance of Mrs. *L* to be paid the whole.

# HERE AND THERE

## LEISURE MOMENTS

Now, when the vacation is so nearly over, is the time to pick up a few stray threads and recall what a representative cross-section of the legal community, to use the current jargon, has been doing with itself. First, the Lord Chancellor, its apex, himself in his office a species apart. His vacation has included an unusually varied set of activities. He and Lady Kilmuir took a first instalment of holiday at Portofino on the Italian Riviera where her brother, Rex Harrison, has a villa overlooking the harbour. By way of contrast, steeping himself in an old English atmosphere (not to say " ye olde Englyshe spirit "), he attended a luncheon given by Lord Sempill in honour of the Siamese mission, based on the principle that our diplomatic guests while in London should do as London used to do. The South Kensington hotel where they were entertained specialises in that sort of thing, and Elizabethan wenches distributed peacock, boar's head, ham " in caffyn " and syllabub and poured out sack and mead, while a boy sang grave Elizabethan melodies. Surely, the thing should not have stopped there, and Lord Kilmuir should have been required to attend disguised as Sir Nicholas Bacon, the first Elizabeth's Lord Keeper. Finally, emerging from the past he played a creditable part for the Politicians in the cricket match at East Grinstead in Sussex when they drew with the Stage. Lord Kilmuir scored 15 runs before he was bowled, though it was observed that, no doubt because the anxieties of his office had caused him to lose weight, he was hampered in his actual running by trousers that had to be held up as he moved. This check on his speed he partly made up for by wearing tennis shoes. In a crew-necked white sweater he was a striking figure on whom the Press photographers concentrated. They recorded the Lord Chancellor driving, the Lord Chancellor gravely being assisted in an adjustment of his trousers, the Lord Chancellor giving an autograph to a beautiful young lady. Sir Walter Monckton, who scored six before being bowled a googly from Rex Harrison, was described by the sartorial critics as most elegant and correct, even to the studs on his boots, which did not, however, prevent him from slipping flat on his face as he scrambled home after a chancy run. Otherwise he was a model of agility. Said one critic, his cricket " was like his speeches, not spectacular but well-reasoned, incisive." His performance marked his recovery from the indisposition he suffered while on holiday in Italy by Lake Garda. Lord Cohen has also been laid up. Owing to fibrositis he had to spend part of his holiday in St. Mary's Hospital, Paddington. By contrast, Mr. Justice Karminski and Lady Karminski went to Kuala Lumpur to visit their daughter who is married out there to Lord Cohen's son, Hugh.

## VACATION ACTIVITIES

As usual, rumours of retirement have been busy with the names of Lord Goddard, aged seventy-eight, and Lord Merriman, aged seventy-five, with twenty-three years' judicial service behind him. But in the case of such vigorous veterans one has got accustomed to treating such rumours with incredulous reserve. To Lord Goddard one might recommend the riposte indulged in by Lord Esher when people began to hint that he could not go on much longer as Master of the Rolls; he would get a new wig. There has also been some speculation as to Lord Radcliffe's future, ever since he was nominated as one of the three trustees to run the charitable, artistic, educational and scientific foundation to which is to be donated the greater part of the £300 million fortune of the late Mr. Calouste Gulbenkian. Such an exacting task would hardly be compatible with the work of a Lord of Appeal. For him there must be a very strong pull both ways, both at the level of inclination and at that of public duty. Chance scraps of information about the vacation activities of three of the Lords Justices of the Court of Appeal: Utterly faithful to his professional interests (as one would expect), Lord Justice Denning has been carrying the true doctrine of the development of the law to distant places. In August he addressed the American Bar Association's annual convention at Philadelphia on the basic freedoms of modern man. Some of these, he said, had been abused. Freedom of the Press had been abused by certain newspapers " pandering to sensationalism in order to increase their circulation " both by invading the proper privacy of individuals and making prejudical comments on cases which were *sub judice*. Some trade unions, he said, had also been guilty of an abuse of freedom in the matter of strikes, official and unofficial, and he suggested the establishment of impartial tribunals to determine labour disputes. Lord Justice Birkett, too, is an accomplished and ready lecturer and addresser of intelligent assemblies, but the most striking holiday task reported of him this summer is the winning of a prize of £1 13s. 4d. in a *Spectator* literary competition for a description of the fight between David and Goliath in the manner of John Arlott. One would like to suggest that John Arlott should return the compliment with an impression of Birkett, L.J., delivering judgment, say, in an action for damages by Goliath's personal representatives against David. A more unexpected variant of time off comes from Lord Justice Singleton, who extended his experience of life (always rather a good thing to do) by an excursion into shopkeeping. Having heard that the proprietors of the tobacco, newspaper and sweet shop where he deals, when living with his sisters at Lytham St. Anne's, thought they would not be able to leave it to see their charming daughter Jean crowned queen of the local fête, he volunteered to look after the business for them. Much to their surprise, for they thought he was joking, he duly turned up and took over. Contrary to expectations, for it was thought that everyone would be at the celebrations, his presence created something of a trade boom and the morning's takings were £10. Other vacation activities reported have been Judge Gordon Clark (in his capacity as Cyril Hare) attending the first night of his play " The House of Warbeck " at the Theatre Royal, Margate, and a yachting Q.C. saving life at sea when, sailing his Bermuda-rigged sloop off Whitstable, he saw a little dinghy capsize.

RICHARD ROE.

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The SOLICITORS' ARTICLED CLERKS' SOCIETY have the following activities scheduled for the remainder of this month: Tuesday 27th—Debate; the motion is " That capital punishment should be abolished ", 6 p.m. for 6.30 p.m., The Law Society's Hall. Wednesday 28th—Rugby, S.A.C.S. *v.* The Tortfeasors (a Law School team), at the Old Alleynians' ground, Dulwich Common; train from Victoria to West Dulwich station, turn right at the station and walk along the side of the common for a quarter of a mile; the ground is on the right; those wishing to play contact Irving Benjamin, c/o The Society, or at TUL 4937 (evenings). Saturday, 1st October—An Autumn Dance at the Royal Empire Society, Northumberland Avenue, 7.30 p.m. to midnight; dress optional; tickets 6s., which includes buffet; these may be obtained from the Dance Secretary (S.A.C.S.), c/o The Law Society.

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If there is no power to withhold, there may be power to discriminate, so that by a reduction of one child's annuity to £85 and a proportionate increase of the other's, one child's allowance may be preserved.

MONDAY, 12TH

In February last, The Law Society's Council submitted to the Law Reform Committee a Memorandum on "The Rule against Perpetuities," which will be found in an appendix to the Annual Report at p. 64. Most of the Memorandum is in fact concerned with the rule against remoteness of vesting, which is hardly the same thing as "perpetuity," but this is merely a point for purists.

It is said (para. 2) that the rule is "capricious in its operation and often works much hardship." Well, well. Some of us are still fond of the old rule—so eminently sensible as it is and so easy to remember if not always so easy to apply—and it is at least arguable that it is the bad workman who blames his tools. What a pity that, if it was within their terms of reference, the Council did not apply these strictures to the rule against accumulations! There, if you like, is a rule that is "capricious in its operation and often works much hardship"—especially to conveyancers (see comments in this Diary, 97 SOL. J. 259).

Few will find fault with para. 13, which deals with the upkeep of graves—a "perpetuity" subject proper, which has been quaintly embellished with a Miltonic reference to th' abhorred shears. But it is to be hoped that no eminent and literary jurist will cap the quotation in the Law Reform Committee. "All judging Jove" was to be the arbiter of our just deserts and

> As he pronounces lastly *on each deed*,
> Of so much fame in Heaven expect they meed.

The moral is obvious—the profession should draw its deeds properly!

TUESDAY, 13TH

The "wait and see" recommendation (para. 3 of the Memorandum) is best considered by reference to the type of case that so often arises in practice. *H* and *W* on their marriage make a marriage settlement on conventional—or at least formerly conventional—lines. There are two children of the marriage, *S* and *D*. *H* and *W*, reserving their life interests, appoint half the fund to *S* for life with remainder to his children who attain twenty-one years of age in equal shares; this in purported exercise of a special power of appointment of which *H* and *W's* issue are the objects. The life interest appointed to *S* is unobjectionable, for it must vest *in interest* at the death of the survivor of *H* and *W* (the two lives in being when the power was created). The remainder violates the rule because it cannot be predicated of the children of *S* that they will all be born whilst one or other of their grandparents, *H* and *W*, are still alive; those born later, *ex hypothesi*, cannot attain twenty-one years of age before the prescribed period runs out.

Under the present system, at least if the appointment was revocable, *H* and *W* can make a fresh appointment; or at worst the trusts in default of appointment will usually carry the fund to their children. In either of these events *H*, *W*, *S* and *D* and their respective legal advisers (assuming that they spot the point at all and *a fortiori* if they do not!) will all know where they stand; or, if not, they will be able to find out by applying—or moving the trustees to apply—to the court. And all this without waiting for the death of the survivor of *H* and *W*, to say nothing of another twenty-one years after that. One thing seems reasonably clear—that, whatever the difficulties of adjusting the position, by the exercise of special powers, whilst *H* and *W* are alive, it will certainly be too late to make suitable arrangements when they are dead.

Now it seems that we shall no longer be able to say "*id certum est quod certum reddi potest.*" There is to be a new and improved slogan—"wait and see." Suppose then, that *S* has two children, Jack and Jill, born in the lifetime of *W*, who survived *H*. Jack and Jill have obligingly conformed with the rule on this new *de facto* basis. Are the trustees to wait for another twenty-one years to see whether Tom, Dick and Harry put in a belated appearance after their grandmother's death? And if these little blighters are born, what is to be the position? To close the class to Jack and Jill seems manifestly unfair. To open it to all children whenever born really makes nonsense of the rule. To divest Jack and Jill by defeasance of their interests on the birth of a younger brother looks mighty capricious. Some artificial elimination of the qualifying age—in extension, say, of the "easement" to be found in s. 163, Law of Property Act, 1925—might well bring all into the fold except those born outside the period, and is perhaps the best solution. There is not much hint of all this in the Memorandum. One is rather left to suppose that the devil is to take the hindmost, late-comers being duly "pruned off" by the court under para. 6 "because the class has been too widely drawn."

If the interests of Jack and Jill are to be subject to defeasance upon the birth of a younger child, some remarkable results may follow. Solicitors may find themselves advising the hypothetical Mrs. *S.* to have no more children after the death of her mother-in-law, lest by so doing she should enlarge the permissible class and so defeat the expectations of her elder children. Such artificial restraints upon the birth-rate are deprecated!

It is only fair to add that some such reform as this was recommended by Lord Blanesburgh some thirty years ago in his speech on the appeal in *Ward* v. *van der Loeff* [1924] A.C., at pp. 678–9, but the present writer respectfully prefers the view expressed by Lord Kenyon in *Jee* v. *Audley*, 1 Cox 324–6, one of the leading authorities against "wait and see." Lord Kenyon said: "I shall not strain an intention at the expense of removing the landmarks of the law." And in the same case he remarked that the rule was "grown reverend by age, and it is not now to be broken in upon." This was in 1787, but the principle seems equally sound to-day.

WEDNESDAY, 14TH

Of the recommendation (paragraph 4 of the Memorandum) that the court should have a general power to prune offending gifts, it is worth while to observe two basic and seemingly fallacious assumptions: (*a*) that the "donor's" real intentions are "manifest" and (*b*) that the judge has the relatively simple task of striking out a few offending words.

In practice things seldom work out like that. The first but least obvious difficulty is to identify the "donor." The donor of a power of appointment manifestly intends the donee to keep within the permitted limits of remoteness and as a general rule says so. The donee manifestly ignores or flouts the warning. Here are two "manifest" but irreconcilable "intentions."

The second and more obvious difficulty is to decide what were the "manifest" intentions of the donor, when identified. In practice, one usually finds that the draftsman had a choice of half a dozen or more different ways of bringing a gift within the rule. On the footing of this recommendation,

it seems that the judge will have to decide whether the draftsman should have closed the class twenty-one years after the death of the settlor, twenty-one years after the death of *X*, or twenty-one years after the death of Prince Charles or Princess Anne.

So much for "manifest intentions." When the intentions are manifest, the judge must still give them expression, which brings us to point (*b*) above. In my limited experience of clauses that offend against the rule, one seldom wishes to *strike out*; one usually wishes to *put words in*, to save them. And so one might expect, for it is usually that the class of beneficiaries needs to be restricted by *adding* cautionary words omitted by the draftsman. In brief, though there may be a few simple cases where "lopping" will serve, there are likely to be many more where nothing short of "remodelling" will suffice. The Council are against "remodelling" and I could wish that they were against tinkering, too. It might on the whole be the better solution to leave the venerable rule, in all its principal features, severely alone.

### Weekend Reflections

It is a widely held, but in my opinion fallacious, view that wills should be expressed in simple terms that clients can understand. I have far more trouble with clients who try to take an intelligent interest than with those who do not, and sensibly more with simple provisions than with those that, at least to the lay mind, are complex. A perennial source of difficulty is anything in the nature of a reference to a trust or a trust fund. The notion that a trust fund may be held in trust for *A* absolutely, so that he may call upon the trustee to transfer the capital to him, does not suggest itself spontaneously to the average testator. To him a "trust" connotes a "continuing trust." The point has been raised so often that as a general rule I make a point nowadays of meeting it in advance. The explanation that I usually offer is to the effect that the only manner in which trustees can hold trust property is "in trust," but it is not to be inferred from this expression that there is any continuing trust, and so on. But I must have been off my guard when sending Mr. *W* his draft will, for back it comes with a very civil letter saying that it is not what he wants at all; he has mussed up the draft with rings round "trust" wherever the phrase occurs, and it is plain that he does not think highly of my drafting. The usual letter must be sent in reply: by dint of repetition it will surely earn a place in that useful book of repetition which, when published (*ante*, p. 628). It would certainly save trouble all round if we could devise some formula that clients would not even attempt to understand. It should not be difficult to find a Humpty-Dumpty formula for "trust fund," and, doubtless, any word in the dictionary would do, saving only those that, being scandalous or scurrilous, are in danger of being excised.

By the same token, it was not until I hit upon the device of incorporating Form 8 of the Statutory Wills Forms, 1925, that I obtained a happy release from clients' questions upon the meaning of trusts for sale and conversion and all those subsidiary directions relating to *Howe* v. *Dartmouth*, *Re Chesterfield* and *Allhusen* v. *Whittell*. The direction that income accruing from the death should be treated and applied as income was, I remember, especially galling and tended to provoke a question most simply translated as "What the hell?" Now all this is a thing of the past. I have stencilled copies of Form 8 available and invariably offer to supply a copy if desired; it is seldom, if ever, desired. Another, and perhaps more important advantage that one obtains by using this form is freedom to concentrate on the provisions of the will that really matter.

The trust for sale with power to postpone is another conception that puzzles clients. When a testator has given express instructions that his house is *not* to be sold, but is to be available as a residence for his widow, it is no wonder that he is shocked when he reads the usual jargon of a trust for sale. My anticipatory formula is to the effect that the trust is best treated for practical purposes as a trust to postpone sale with a power of sale. This may be offensive to some purists, but it does fit neatly into my theory that on many subjects, such as this, clients (or it may be their lawyers) think backwards: at all events their respective mental processes are by no means identical.

"Escrow."

# SURVEY OF THE WEEK

## STATUTORY INSTRUMENTS

**Acquisition of Land** (Rate of Interest on Entry) Regulations, 1955. (S.I. 1955 No. 1383.)

These regulations, which came into force on 10th September, prescribe a rate of 5 per cent. for the interest to be paid on compensation where entry is made on land compulsorily purchased before payment of compensation. The previous rate, fixed in 1952, was 4½ per cent.

Acquisition of Land (Rate of Interest on Entry) (Scotland) Regulations, 1955. (S.I. 1955 No. 1384.)

**Aden Colony** (Electoral Provisions) Order in Council, 1955. (S.I. 1955 No. 1396.)

**Boarding-Out of Children** Regulations, 1955. (S.I. 1955 No. 1377.) 8d.

**District of the River Conon** (Annual Close Time) Order, 1955. (S.I. 1955 No. 1403 (S.127).)

**Exeter-Leeds** Trunk Road (Burton-upon-Trent By-Pass) (Revocation) Order, 1955. (S.I. 1955 No. 1401.)

**Importation of Animal Semen** Order, 1955. (S.I. 1955 No. 1390.)

**London-Norwich** Trunk Road (Potter Street Diversion) Order, 1955. (S.I. 1955 No. 1391.)

**Maintenance Orders** (Facilities for Enforcement) (Guernsey) Order, 1955. (S.I. 1955 No. 1395.)

This order extends the Maintenance Orders (Facilities for Enforcement) Act, 1920, to Guernsey as from 8th September, 1955.

**National Insurance** (Industrial Injuries) (Benefit) Amendment Regulations, 1955. (S.I. 1955 No. 1382.)

**Official Secrets** (Cyprus) (No. 2) Order, 1955. (S.I. 1955 No. 1410.)

**Recoveries From Acquiring Authorities** Regulations, 1955. (S.I. 1955 No. 1381.) 5d.

As to these regulations, see p. 650, *ante*.

Recoveries from Acquiring Authorities (Scotland) Regulations, 1955. (S.I. 1955 No. 1404 (S.128).) 5d.

**Safeguarding of Industries** (Exemption) (No. 7) Order, 1955. (S.I. 1955 No. 1380.)

**Stopping up of Highways** (Devonshire) (No. 2) Order, 1955. (S.I. 1955 No. 1392.)

Stopping up of Highways (Lincolnshire—Parts of Lindsey) (No. 1) Order, 1955. (S.I. 1955 No. 1393.)

Stopping up of Highways (London) (No. 41) Order, 1955. (S.I. 1955 No. 1394.)

Stopping up of Highways (Wakefield) (No. 3) Order, 1955. (S.I. 1955 No. 1400.)

Stopping up of Highways (Warwickshire) (No. 3) Order, 1955. (S.I. 1955 No. 1405.)

**Trinidad and Tobago** (Legislative Council—Extension of Duration) Order in Council, 1955. (S.I. 1955 No. 1397.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

# POINTS IN PRACTICE

**Intestacy**—Sole Personal Representative Beneficially Entitled—Conveyance of Mortgaged Premises in Consideration of Covenant to Pay Mortgage

*Q.* In 1949, Mrs. *X* purchased a dwelling-house and obtained an advance from a building society. Mr. *X*, Mrs. *X's* husband, entered into a separate deed with the building society guaranteeing the payment of the mortgage. Mrs. *X* died last month intestate, and letters of administration to her estate have been granted to Mr. *X*, the only person entitled to the estate, which is under £5,000. Mr. *X* has agreed to transfer the house to his married daughter on her agreeing to take over the existing mortgage and the building society has agreed to transfer the mortgage to her. There will be no cash consideration. Do you agree that Mr. *X* should convey the house to his daughter, in consideration of her covenant to pay the mortgage, as personal representative of Mrs. *X*, and that it is not necessary, or even desirable, for him to execute an assent in his own favour and then convey as beneficial owner? Will it be necessary to have the stamp duty adjudicated or will this duty only be on the amount of the mortgage transferred, plus 10s. covenant duty?

*A.* (1) We think the transaction could be carried out either way. If, however, the house is worth appreciably more than the amount owing on the mortgage we think it better to disclose the substance of the transaction (which then involves an element of gift) by an assent and conveyance as beneficial owner. (2) The stamp should be adjudicated if the house is worth more than the sum owing on the mortgage. If there is an element of gift the revenue may claim duty on an appropriate value.

**Town and Country Planning Acts**—Recovery by Purchaser of Payment on Account of Development Charge Subsequently Set Off by Vendor

*Q.* We are acting for *A* who, early in 1952, was negotiating for the purchase from *B* of freehold land together with a house which *B* was going to build thereon. The price was agreed and a building licence obtained for £*x*. In August, 1952, *A* received a letter from *B* asking him to agree to an increase in the basic purchase price of £25 because: "Since we made our negotiations with you . . . the Central Land Board have levied a development charge on the houses already licensed. After allowing for the proportionate claim we have on the Land Board for the whole estate, we have no alternative but to advise you that we shall have to ask you to pay an additional twenty-five pounds (£25) for your house." *A* agreed as follows: "I agree to pay an additional twenty-five pounds (£25) for the above house in view of the development charge you have been called upon to pay and which was not included in your building costs supplied to the housing department. (Signed, etc.)." In a letter accompanying this agreement, *A* wrote: "It is understood that the increase is due to the levying of an unforeseen development charge by the Central Land Board and not included in your original building costs." The property was conveyed in December, 1952, from *B* to *A*. When the question of a claim under the Town and Country Planning Act, 1954, was raised, *B's* solicitors replied: ". . . we have now taken our client's instructions. They inform us that the development charge . . . was subsequently set off against their claim under the Town and Country Planning Act, 1947. As no part of the payment due under this Act is payable to your client (see the relevant contract) there can be no question of any payment being made by our clients in the circumstances to yours." Has *A* any right to the return of the £25 either on the basis that it was obtained by misrepresentation or otherwise?

**Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, 21 Red Lion Street, London, W.C.1.**

**They should be brief, typewritten in duplicate, and accompanied by the name and address of the sender on a separate sheet, together with a stamped addressed envelope. Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.**

*A.* On the facts given we do not consider that *A* has a claim for the sum of £25. *B's* letter of August, 1952, mentioned the allowance "for the proportionate claim" on the Central Land Board. Having regard to *B's* solicitors' recent letter, it appears that set-off was arranged *subsequently*. This may, for instance, have been done under the builders' "near-ripe" concession which is described in Emmet on Title, 13th ed., vol. II, p. 963. Consequently, we do not see any ground for alleging a misrepresentation in August, 1952. We are not aware of any other ground for claim by *A*; the case does not seem to fall within any of the heads in Pt. I of the 1954 Act. Further, we would point out that the action of *B* in arranging a set-off instead of paying the development charge may not necessarily benefit him. The effect of set-off may be to reduce the "unexpended balance of established development value" available for the rest of the estate; see 1954 Act, Sched. II, which reduces or extinguishes claim holdings and *ibid.*, s. 17, defining the "unexpended balance." *A's* position is unfortunate, but it was widely thought that one should not make a payment on account of development charge unless one took an assignment of the benefit of the 1947 Act claim.

**Assault**—Dispute as to Land—Jurisdiction

*Q.* I act for a client who was recently assaulted near his home in the country. I have applied to the magistrates for a summons, and this has been granted. There is, however, a background to the incident complained of, and whilst the assault is a serious one, the learned magistrates' clerk has suggested to me that the correct court for the institution of the proceedings is the county court, since in his view the question concerns a dispute as to the ownership of (church) land. It is quite true that, for some years past, acrimonious disputes have arisen as to the ownership of certain land, but I take the view that this is not the matter directly in issue, and that the assault was an independent matter. I would mention that a few years ago the defendants took out a summons against my client for alleged assault, but at the hearing my client, through his counsel, successfully pleaded that the justices had no jurisdiction since a dispute as to ownership of land was involved, and the summons against my client was dismissed. The defendants are men of straw, and proceedings in the county court do not commend themselves to me if only for this reason. In your opinion, would a prosecution be likely to fail? The police are not inclined to take action.

*A.* If the magistrates decide that a question as to the title of lands or any interest therein or accruing therefrom arises, they should commit the case for trial (not dismiss it). The cases as to the meaning of "question of title" are collected in the notes in Stone's Justices' Manual to s. 46 of the Offences Against the Persons Act, 1861 (87th ed., p. 488). In fact, it seems as if the magistrates' clerk has already made up his mind that a question of title is involved and presumably he will so advise the magistrates. The only way by which the magistrates can be made to accept the case and try it themselves is by mandamus. Whether or not the High Court would grant mandamus cannot be decided on the information before us, and, as it is, by the time mandamus has been applied for, the case would have reached quarter sessions anyhow. It would probably be cheaper to proceed with the case at quarter sessions than go to the High Court for a mandamus, and probably quicker, too. Presumably your client does not wish the case to go to quarter sessions. Unless the magistrates' clerk changes his view and is found to be likely to advise the magistrates to try the case themselves, we feel that it would be both quicker and cheaper to withdraw the summons and re-start the proceedings in the county court (where, if appropriate, an injunction as well as damages could be sought). The authority for the magistrates to commit an assault case for trial in lieu of dismissing it is *R.* v. *Holsworthy Justices*; *ex parte Edwards* [1952] 1 T.L.R. 410; 96 Sol. J. 152. But where a statute empowers magistrates only to try a case and quarter sessions so have no jurisdiction, the magistrates can try it themselves although a question of title is involved (*Duplex Settled Investment Trust, Ltd.* v. *Worthing Corporation* (1952), 116 J.P. 176; 96 Sol. J. 104). Possibly, this would authorise proceedings in the magistrates' court to bind the defendants over to be of good behaviour. Ouster of jurisdiction generally is discussed in Stone, 87th ed., p.246.

# NOTES AND NEWS

### Honours and Appointments

Mr. J. S. T. WILLIAMS has been appointed deputy town clerk of Wednesbury, after eight years' service in the town clerk's department. He succeeds Mr. Geoffrey Thornton, who has resigned to go into private practice.

### Personal Notes

Mr. Frederick D. Hammond, solicitor, of East Dulwich, London, S.E.22, and Mrs. Hammond celebrated their golden wedding on 9th September.

### Miscellaneous

#### BATH DEVELOPMENT PLAN

The Minister of Housing and Local Government has approved with modifications the development plan for the County Borough of Bath. The plan as approved will be deposited in the Guildhall, Bath, for inspection by the public.

Mr. K. J. P. Barraclough, metropolitan magistrate, will leave Bow Street Court on 10th October to sit at West London Court. His place will be taken at Bow Street Court by Mr. C. J. Campion, who was appointed a metropolitan magistrate last August and has sat since then at West London Court.

#### LOW DEPOSIT HOUSE PURCHASE SCHEME FOR GUARANTEEING HIGHER ADVANCES SIMPLIFIED

The scheme for very low deposits in house purchase has been simplified. There is to be only one provision instead of the previous two alternative methods whereby local authorities guarantee higher than normal advances by building societies to those buying or building houses.

Under the new scheme a house purchaser can obtain a 95 per cent. advance on a £2,500 house built after 1918. Previously a 95 per cent. loan was limited to post-1918 houses worth £2,000. Advances for pre-1919 houses are limited to 90 per cent. on a £2,500 house.

The minimum normal advance by the building society, above which the guarantee operates, will be governed by a sliding scale and will depend upon the amount of the deposit made by the purchaser. It will have the advantage that a purchaser wishing to borrow less than the full 95 per cent. or 90 per cent. will now be able to do so.

The percentage figures governing the operation of the guarantee are as follows :—

| *Percentage actual advance* | *Percentage normal advance* |
|---|---|
| 95 | 66⅔ |
| 94 | 67 |
| 93 | 67 |
| 92 | 68 |
| 91 | 69 |
| 90 | 70 |
| 89 | 71 |
| 88 | 72 |
| 87 | 73 |
| 86 | 74 |
| 85 | 75 |
| 84 | 76 |
| 83 | 77 |
| 82 | 78 |
| 81 | 79 |
| 80 | 80 |

The local authority's guarantee will end when the principal outstanding falls to 50 per cent. of the purchase price or valuation, whichever is the lower.

The maximum rate of interest permissible will be that being charged by the society at the date of the advance in the normal course of business on advances to owner-occupiers.

If the mortgage deed contains an interest variation clause, this will permit the rate of interest to be changed during the currency of the mortgage without invalidating the guarantee given by the local authority.

Where the original term of the guarantee is for not more than twenty-five years, the guarantee will remain effective if the repayment period is extended because of the operation of an interest variation clause.

Local authorities are asked to give the same consideration to applications for guarantees from societies registered under the Industrial and Provident Societies Acts as they are prepared to give to applications from building societies.

Over 900 authorities have applied for the Minister's approval to operate the guarantee schemes. The Minister asks that those who have not indicated whether they intend to operate the original schemes, or have decided not to do so, should reconsider the matter in the light of the revised scheme.

#### NATIONAL PARKS AND ACCESS TO THE COUNTRYSIDE ACT, 1949

The following notices of the preparation of maps and statements under the above Act, or of modifications to maps and statements already prepared, have appeared since the tables given in vols. 97 and 98 and at pp. 64, 154, 243 and 421, *ante* :—

DRAFT MAPS AND STATEMENTS

| Surveying Authority | Districts covered | Date of notice | Last date for receipt of representations or objections |
|---|---|---|---|
| Cheshire County Council | Dukinfield, Hyde, Stalybridge Boroughs; Bredbury and Romiley, Cheadle and Gatley, Hazel Grove and Bramhall, Longdendale, Marple Urban Districts; Disley, Tintwistle Rural districts | 18th July, 1955 | 25th November, 1955 |
| Cornwall County Council | Fowey, Lostwithiel, Saltash Boroughs; Looe Urban District | 12th July, 1955 | 30th November, 1955 |
| Cumberland County Council | Whitehaven Borough; Ennerdale, Millom Rural Districts: further modifications to draft map and statement of 1st April, 1953 | 30th July, 1955 | 9th September, 1955 |
| Dorset County Council | Wareham Borough; Swanage Urban District; Wareham and Purbeck Rural District | 1st July, 1955 | 4th November, 1955 |
| East Suffolk County Council | Felixstowe Urban District; Deben, Gipping, Hartismere Rural Districts: further modifications to draft map and statement of 26th January, 1954 | 21st June, 1955 | 30th August, 1955 |
| Lincoln County Council, Parts of Lindsey | Horncastle Urban and Rural Districts; Woodhall Spa Urban District | 23rd June, 1955 | 4th November, 1955 |
| Norfolk County Council | Walsingham Rural District; Cromer, Wells-next-the-Sea Urban Districts | 28th June, 1955 | 30th October, 1955 |
| Northamptonshire County Council | Rushden Urban District: modifications to draft map and statement of 29th July, 1953 | 23rd August, 1955 | 6th October, 1955 |
| Worcestershire County Council | Tenbury Rural District: modifications to draft map and statement of 16th June, 1953 | 8th July, 1955 | 31st August, 1955 |

PROVISIONAL MAPS AND STATEMENTS

| Surveying Authority | Districts covered | Date of notice | Last date for applications to Quarter Sessions |
|---|---|---|---|
| East Sussex County Council | Bexhill, Rye Boroughs; Burgess Hill, Cuckfield, Portslade-by-Sea Urban Districts | 24th June, 1955 | 22nd July, 1955 |
| Northampton County Council | Brixworth Rural District | 23rd August, 1955 | 22nd September, 1955 |
| | Wellingborough Rural District | 7th September, 1955 | 6th October, 1955 |
| Soke of Peterborough County Council | Administrative County of the Soke of Peterborough | 22nd June, 1955 | 19th July, 1955 |
| Southampton County Council | Christchurch Borough; Ringwood and Fordingbridge Rural District | 24th June, 1955 | 30th July, 1955 |

In addition the following definitive maps and statements have been announced :—

(1) By Gloucester County Borough Council, in a notice dated 28th July, 1955, covering Robinswood Hill and land to the south and east thereof in the City of Gloucester.

(2) By Northampton County Council, in a notice dated 27th June, 1955, covering Brackley Rural District.

(3) By Southampton County Council, in a notice dated 22nd July, 1955, covering Aldershot Borough ; Farnborough, Fleet Urban Districts ; Hartley Wintney Rural District.

# OBITUARY

JUDGE T. M. BACKHOUSE

His Honour Judge Thomas Mercer Backhouse, of Newstead Abbey, Nottinghamshire, has died at the age of 52. Called by Gray's Inn in 1926, he was county court judge at Derby, Nottingham, Mansfield and Doncaster, and in 1945 he conducted the prosecution case at the Belsen-Auschwitz trials at Luneberg.

MR. L. G. BAX

Mr. Leslie Gaunt Bax, solicitor, of Pinner, and Gray's Inn Square, W.C.1, died on 24th August. He was admitted in 1944.

MR. W. BUTLER

Mr. Wilson Butler, M.A., LL.M., solicitor, of Broughton-in-Furness, died on 25th August, aged 86. He was admitted in 1891.

MR. T. R. KENT

Mr. Tom Rowland Kent, solicitor, of Reading, died on 20th August, aged 89. Admitted in 1905, he was for many years deputy coroner for Reading, retiring in 1934. He was a founder and at one time chairman of the Reading Solicitors' Association and a member of the Reading Town Council from 1939 to 1946. He was made a Freeman of the City of London in 1915.

MR. H. MOTTERSHEAD

Mr. Harry Mottershead, solicitor, of Manchester, died on 8th September, aged 71. He was admitted in 1919.

MR. N. MUSCAT

Mr. Nathan Muscat, solicitor, died on 12th September, aged 61. He was admitted in 1922.

MR. S. NOLAN

Mr. Sean Nolan, sheriff of the City of Dublin, died at Alassio, Italian Riviera, aged 58. He was admitted a solicitor in the Republic of Ireland in 1935.

MR. D. REES

Mr. David Rees, solicitor and coroner for East Glamorgan, died on 1st September.

MR. E. A. REHDER

Mr. Ernest A. Rehder, solicitor, of Dulwich, died on 10th September, aged 87. He was admitted in 1891, and was a past-master of the City of London Solicitors' Company.

MR. J. J. SCHOFIELD

Mr. John James Schofield, solicitor, of Castleford, died on 1st September. Formerly in practice at Bradford, he was last year's president of the Wakefield Incorporated Law Society. He was admitted in 1913.

MR. T. G. WILLIAMS

Councillor Thomas Griffin Williams, solicitor, of Wolverhampton, died on 3rd September, aged 48. He was president of Wolverhampton Law Society in 1953–54, and for ten years had been a member of Wolverhampton town council. He was admitted in 1933.

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**Wills and Bequests**

Sir Robert Vaughan Gower, of Tunbridge Wells, solicitor, left £67,831 (£49,130 net).

Mr. John William Hattersley, of Leckhampton Hill, Cheltenham, formerly a solicitor of Mexborough, left £25,667 (£25,539 net).

Alderman Leonard William Arthur White, of East Bridgeford, solicitor, and vice-chairman of Nottinghamshire County Council, left £34,573 (£20,531 net).

# SOCIETIES

UNITED LAW DEBATING SOCIETY

The annual dinner will be held this year on Monday, 12th December, in the Hall of Lincoln's Inn, by courtesy of the benchers. Lord Justice Denning will be in the chair and other speakers will include His Honour Judge Gordon Clark, Sir Gerald Kelly, P.P.R.A., and Mr. Paul Jennings. Details are also announced of the society's debates for October, to be held in Gray's Inn Common Room at 7.15 p.m. : Monday, 3rd October, " That the policy of ' Apartheid ' is in the interests of the South African people as a whole " ; Monday, 10th October, " That the discovery of America was a colossal mistake " ; Monday, 17th October, " That the case of *Rajbenback* v. *Mamon* [1955] 1 Q.B. 283 was wrongly decided (promise by landlord to pay £300 to protected tenant if he left—enforceability by tenant) (see L.Q.R., July, 1955, at p. 327)) ; Monday, 24th October (quickfire debates) (1) " This house would welcome the introduction of a 45 m.p.h. speed limit " ; (2) " That Great Britain should take steps to conform with the ' drive on the right ' rule " ; (3) " The Continental holiday is much overrated " ; (4) " Cats are superior to dogs " ; Monday, 31st October, " That the dropping of litter should be made an offence for which fines on the spot would be exacted."

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## PRINCIPAL ARTICLES APPEARING IN VOL. 99

2nd July to 24th September, 1955

For articles up to and including 25th June, see Interim Index


| | PAGE |
|---|---|
| Absolute and Conditional Discharge | 4 |
| Accidents to Children | 5 |
| Agricultural Holdings Arbitrations : Finality (Landlord and Tenant Notebook) | 5 |
| Alterations to Licensed Premises | 5 |
| Articles of Clerkship : The Covenant in Restraint of Trade | 4 |
| Assignment of Controlled " Fag-End " (Landlord and Tenant Notebook) | 5 |
| Bankruptcy Decisions of 1954–55 | 6 |
| Burden of Proof and Private Street Works | 5 |
| " Business " in Pt. II of the Landlord and Tenant Act, 1954 (Landlord and Tenant Notebook) | 5 |
| Business Premises : Effect of Sale of Reversion (Landlord and Tenant Notebook) | 6 |
| Claims for Compensation and Planning Decisions | 5 |
| Control : Exemption of Housing Trusts (Landlord and Tenant Notebook) | 5 |
| Control : First Assessment of Sub-Divided Flats (Landlord and Tenant Notebook) | 6 |
| Control : Protection of Sub-Tenant (Landlord and Tenant Notebook) | 6 |
| Control : Suspended Rates Increase (Landlord and Tenant Notebook) | 6 |
| Derequisitioning | 6 |
| Disclaiming a Company's Freeholds (Company Law and Practice) | 4 |
| Estate Duty Decisions (Taxation) | 6 |
| Estoppel by Waiver (Landlord and Tenant Notebook) | 4 |
| Evidence of Spouses in Criminal Cases | 5 |
| Far to Go : A Country Child in Trouble | 6 |
| Improvement made in Pursuance of a Contract (Landlord and Tenant Notebook) | 5 |
| Inheritance Act Applications (Conveyancer's Diary) | 4 |
| Interim Income of Entailed Personalty (Conveyancer's Diary) | 5 |
| Jurisdiction over Infants : A Statutory Restriction | 6 |
| *Jus Spatiandi* (Conveyancer's Diary) | 553, 5 |
| Knowledge of Acceptance | 4 |
| Non-Cohabitation Clause, The | 5 |
| Payment for Improvements to Settled Land (Conveyancer's Diary) | 6 |
| Power of Advancement (Conveyancer's Diary) | 5 |
| Procedure Cases of the Year | 637, 6 |
| Public Element in Charitable Trusts (Conveyancer's Diary) | 4 |
| Rating and Valuation (Miscellaneous Provisions) Act, 1955 | 6 |
| Recent Road Traffic Cases | 5 |
| " ' Repair ' Includes Maintenance . . . " (Landlord and Tenant Notebook) | 5 |
| Report of Royal Commission on Taxation of Income (Conveyancer's Diary) | 594, 609, 6 |
| Safe Means of Access to Factories | 5 |
| Sales under Private Street Works Legislation | 6 |
| Sharing the Bedroom | 5 |
| Sport as a Charitable Object (Conveyancer's Diary) | 4 |
| Strikes | 4 |
| " Take the Property as It Is " (Conveyancer's Diary) | 6 |
| Taxation of Capitalisation Issues (Company Law and Practice) | 5 |
| " Tenant by Whom it was Paid " (Landlord and Tenant Notebook) | 4 |
| Town and Country Planning Act, 1954, s. 33 | 5 |
| Trustee Bound by Covenant Personally to Inhabit Farmhouse (Landlord and Tenant Notebook) | 4 |
| Two Decisions on Recent Topics (Conveyancer's Diary) | 5 |
| Warranties on Sale of Motor Car | 6 |



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